

SERVICE DATE – JULY 2, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 43 (Sub-No. 189X)

ILLINOIS CENTRAL RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN  
CHAMPAIGN COUNTY, ILL.

Digest:<sup>1</sup> The Board grants an appeal of a decision issued by the Acting Director of the Office of Proceedings that rejected Topflight Grain Cooperative's notice of intent to file an Offer of Financial Assistance because it was untimely.

Decided: July 1, 2015

On May 11, 2015, the Board, by decision of the Acting Director of the Office of Proceedings (Director), rejected a notice of intent to file an Offer of Financial Assistance filed by Topflight Grain Cooperative (Topflight) under 49 C.F.R. § 1152.27(c)(2) because it was untimely. On May 21, 2015, Topflight filed an appeal of that decision. For the reasons discussed below, we will grant the appeal.

BACKGROUND

Illinois Central Railroad Company (IC), a wholly owned subsidiary of Canadian National Railway Company, filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F-Exempt Abandonments to abandon approximately 3.2 miles of railroad line (the Line). The Line extends between milepost 7.8 in Bondville and milepost 11 in Seymour, in Champaign County, Ill. Notice of the exemption was served and published in the Federal Register on April 10, 2015 (80 Fed. Reg. 19,400). The notice indicated that the exemption would become effective on May 12, 2015, unless stayed by the Board or unless a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. § 10904 was received. Such expressions of intent were due by April 20, 2015.

On April 30, 2015, 10 days after the April 20 deadline, Topflight submitted its notice of intent to file an OFA (NOI). In a reply filed on May 6, 2015, IC argued that Topflight's late-filed NOI should not be accepted. Topflight filed a reply to IC on May 8, 2015, asserting that IC's opposition represents a change of position, that IC's own actions undermine its claimed

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

need for expedition, and that Topflight tendered traffic to IC in the Fall of 2013 but the terms offered by IC made transportation by rail uneconomic.

On May 11, 2015, the Director rejected the NOI, noting that “[n]either in its initial request nor in its May 8 reply does Topflight provide any reason why its notice of intent was late and could not have been filed by the April 20 deadline” and that IC objected to the late filing. On May 21, 2015, Topflight filed its appeal of the Director’s decision, to which IC replied in opposition on June 1, 2015.

On appeal, Topflight argues that there are grounds for reversing the Director’s rejection of Topflight’s late-filed NOI. Topflight argues that granting its appeal would be consistent with the policy of 49 U.S.C. § 10904 and § 10101(4) in favor of continuation of needed rail service. Topflight explains that on March 19, 2015, four days before IC filed its notice of exemption to abandon the Line, Topflight had made inquiries to IC by email about “the plans the CN Railroad has for the rail line” and expressed interest in “starting a discussion about possibly purchasing” the Line.<sup>2</sup> In an email dated March 26, 2015, three days after it had filed its notice of exemption, IC replied to Topflight’s inquiry, stating that it had no interest in selling the Line but making no mention of its already-filed notice of exemption to abandon the Line.<sup>3</sup> Topflight also states that it had approached IC about leasing the Line during the two-year out-of-service period, but it viewed IC’s response as disinterest in reaching an agreement. Accordingly, Topflight argues that IC’s refusal to sell the Line, IC’s failure to disclose its abandonment filing to Topflight, and IC’s response to a lease inquiry during the out-of-service period favor Board acceptance of its late filed NOI.

On reply, IC argues that Topflight’s appeal should be denied. IC states that it had no duty to disclose its abandonment filing to Topflight and that Topflight has not demonstrated that “it has been or would be treated unjustly by enforcement of the OFA deadlines.” Generally citing Board precedent, IC claims that a Board grant of Topflight’s appeal “would introduce uncertainty and delay into an OFA process that, due to predictable and closely-controlled deadlines, is designed to be reliable and expeditious.”

## DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1011.7(a)(2)(ii), the Board has delegated to the Director the authority initially to determine whether offers of financial assistance satisfy the statutory standards of 49 U.S.C. § 10904(d). The Board has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director under § 1011.7. 49 C.F.R. § 1011.2(a)(7).<sup>4</sup> Here, Topflight argues that the Director should not have rejected its NOI.

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<sup>2</sup> Topflight Appeal, V.S. Docherty, Appendix SD-1.

<sup>3</sup> See Topflight Appeal, V.S. Docherty, Appendix SD-2.

<sup>4</sup> Topflight cites 49 C.F.R. § 1011.6(b), which applies to decisions of Board employees acting under authority delegated under that section rather than § 1011.7.

On appeal, the Board considers whether the NOI was properly rejected. While the Director's decision to reject the late-filed notice was in line with precedent, under these circumstances we will grant the appeal and accept the Topflight NOI. As Topflight explains, its NOI was handled by an employee who was not familiar with the Board's procedures or the procedural deadlines that govern the OFA process.<sup>5</sup> While this alone might not excuse the late-filed NOI, IC contributed to the problem by not revealing its pending abandonment filing despite communications with Topflight both prior to and during the pendency of the notice of exemption. IC failed to reveal that information despite Topflight's specific inquiries about the railroad's plans for the Line and IC's rejection of Topflight's offer to purchase the Line. Had IC been forthcoming in its response to Topflight's request for information, Topflight would have had earlier notice of the pending abandonment proceeding (and thus a greater opportunity to file a timely NOI). Candor from IC could have supported the predictable and closely-controlled procedural deadlines that IC suggests are necessary to support a reliable and expeditious OFA process. A mechanical application of Board precedent in this case could encourage a course of dealing that is inconsistent with the intent behind the Board's OFA precedent.<sup>6</sup>

The circumstances presented here warrant granting Topflight's appeal of the Director's decision rejecting the NOI. IC will have until July 13, 2015, to produce the information required under § 1152.27(a), as requested by Topflight. Topflight's OFA will be due by July 23, 2015.

It is ordered:

1. Topflight's appeal of the Director's decision is granted and its notice of intent to file an OFA is accepted.
2. IC is directed to provide Topflight with the requested information by July 13, 2015.
3. Topflight's OFA is due by July 23, 2015.
4. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

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<sup>5</sup> Topflight Appeal 4.

<sup>6</sup> See Hayfield N. R.R. v. Chicago & N. W. Transp. Co., 467 U.S. 622, 630 (1984) (noting the underlying rationale of the Board's OFA process to be an effort to assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to extend the abandonment process).